

Received 1/29/98  
Jaye Jeter - Bragg

~~Jaye Jeter - Bragg~~  
ORIGINAL

# FEDERAL COMMUNICATIONS COMMISSION

DOCKET FILE COPY ORIGINAL

|                        |   |            |
|------------------------|---|------------|
| In Re:                 | ) |            |
|                        | ) | Docket No: |
| IN THE MATTER OF       | ) | WT-94-147  |
| JAMES A. KAY, JR.      | ) |            |
|                        | ) |            |
| License of one hundred | ) |            |
| fifty two Part 90      | ) |            |
| licenses               | ) |            |

Volume: 7 Revised  
Pages: 358 through 417  
Place: Washington, D.C.  
Date: January 21, 1998

## HERITAGE REPORTING CORPORATION

Official Reporters  
1220 L Street, NW, Suite 600  
Washington, D.C.  
(202) 628-4888

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In Re: ) WT DOCKET No.: 94-147  
 )  
JAMES A. KAY, JR. )  
 )  
License of one hundred fifty )  
two art 90 licenses in the )  
Los Angeles, California area. )

Courtroom No. 2  
FCC Building  
2000 L Street, N.W.  
Washington, D.C.

Wednesday,  
January 21, 1998

The parties met, pursuant to the notice of the  
Judge, at 9:03 a.m.

BEFORE: HON. RICHARD L. SIPPEL,  
Administrative Law Judge

APPEARANCES:

On behalf of James A. Kay:

SCOTT A. FENSKE, ESQUIRE  
Thompson, Hine & Flory  
1920 N Street, N.W.  
Washington, D.C. 20036  
(202) 973-2758

On behalf of the Bureau - Gettysburg:

WILLIAM H. KNOWLES-KELLETT, ESQUIRE  
Wireless Telecommunications Bureau  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA 17325

Heritage Reporting Corporation  
(202) 628-4888

## APPEARANCES CONTINUED:

On behalf of the Bureau - Washington:

JOHN J. SCHAUBLE, ESQUIRE  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7310  
Washington, D.C.

On Behalf of Christopher Killian:

JULIAN P. GEHMAN, ESQUIRE  
Mayer, Brown & Platt  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20554  
(202) 955-0828

I N D E X

| <u>WITNESSES:</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> | <u>VOIR</u><br><u>DIRE</u> |
|-------------------|---------------|--------------|-----------------|----------------|----------------------------|
| NONE              |               |              |                 |                |                            |

Hearing Began: 9:03 a.m.

Hearing Ended: 10:27 a.m.

Heritage Reporting Corporation  
(202) 628-4888

1                    P R O C E E D I N G S

2                    JUDGE SIPPEL: We're on the record. This is a  
3 prehearing conference called at my order. It's in  
4 connection with the depositions that are going to be taking  
5 place out on the West Coast the last week in January, first  
6 week in February. I have received the status, that is the  
7 scheduling of the depositions by way of correspondence, so I  
8 think I'm pretty well up to speed in terms of what's to be  
9 expected in terms of witnesses. Now, in terms of the  
10 identity of witnesses, let me qualify it that way. What I  
11 want to do this morning is, I want to address primarily the  
12 scope of the documents with respect to the witnesses, Mr.  
13 Killian and Mr. Barnett who are non-party, non-commission  
14 witnesses, and also the documents with respect to the  
15 Commission witnesses that you've noticed for deposition that  
16 have been authorized by the Commission.

17                    And I know that, Mr. Gehman, I have read your  
18 pleadings, let's start with Mr. Killian because if we can  
19 complete with Mr. Killian, you can be excused.

20                    MR. GEHMAN: Thank you, yes.

21                    JUDGE SIPPEL: Now, I understand -- I understand  
22 what your position is, and I understand -- I believe I  
23 understand what Mr. Kay's position is. What I am -- and I  
24 went back and I reread the ruling. I think that the most  
25 pertinent ruling that I previously made on this is back in

1 '97, M-199 where I ruled that there'd be, in accordance with  
2 the Federal Rules of Evidence, there'd be no extrinsic  
3 evidence with respect to credibility issues, and the Bureau  
4 was willing to take questions on an ad hoc basis and if  
5 things didn't get too much out of control would not be  
6 objecting to evidence that might creep into that category.

7 I -- I am concerned -- I am concerned about  
8 several of the things that you raised in your pleadings, Mr.  
9 Gehman, particularly with respect to the -- the -- two  
10 things, one with respect to the nature of the testimony that  
11 came out in this deposition when the Bureau was, in effect,  
12 on direct testimony, i.e., it says primarily identification  
13 evidence, evidence of identifying documents as opposed to  
14 substantive evidence about who did what, when? Am I  
15 correct?

16 MR. GEHMAN: That's correct.

17 JUDGE SIPPEL: Am I reading your views correctly?

18 MR. GEHMAN: Yes. Authentication of documents and  
19 then identification of, I don't know, a handful of  
20 individuals that apparently are associated with Kay, but  
21 neither of which is, to my view, substantive testimony.

22 JUDGE SIPPEL: All right. Well, let me ask Mr.  
23 Schauble about that. Now, is this going to be -- is this  
24 what you're going to use this witness for, to identify --  
25 for identification purposes, basically?

1           MR. SCHAUBLE: Your Honor, in the scheme of  
2 things, I think Mr. Killian is a relatively narrow witness  
3 as opposed to fact witness as opposed to some of the  
4 witnesses. We think he has knowledge of some facts, you  
5 know, that are within the scope of the issues.

6           MR. KNOWLES-KELLETT: Maybe I can explain it  
7 better, Your Honor.

8           JUDGE SIPPEL: Mr. Kellett -- Mr. Knowles Kellett,  
9 yes, sir. Please.

10          MR. KNOWLES-KELLETT: I don't know if you -- we  
11 have previously submitted our Answers to Interrogatories,  
12 primarily the documents we're discussing are in those  
13 Answers to Interrogatories. Where Mr. Killian in the Fall,  
14 I think of 1993, five years or so ago, compared loading  
15 records that he obtained for various sources, including  
16 Commission records, reports -- industry reports with what  
17 Kay was presenting to the Forest Service we're operating and  
18 there were discrepancies.

19          Now, Mr. Killian had some personal knowledge. He  
20 spoke with some of the people, knew some of the people.  
21 However, to a large extent, he will be used to authenticate  
22 these compilations that were one of a number -- one of the  
23 components that gave rise to the Bureau's investigation in  
24 this matter. Okay. So, he's sort of -- his direct personal  
25 knowledge is limited, and the hearsay rule will definitely

1     come into play, as you know, it's not absolute in  
2     administrative proceedings to extend this corroborating  
3     evidence. Some of it may be solid evidence, but it also  
4     sets the stage, you know, for how this whole thing began.

5             JUDGE SIPPEL: All right. Well, that's up to --  
6     you don't have to lay out your whole theory of this witness.

7             MR. KNOWLES-KELLETT: Okay.

8             JUDGE SIPPEL: I'm just trying to -- see, what I'm  
9     concerned about -- what I'm concerned about is, are you just  
10    asking him questions for purposes of going through this  
11    deposition process or are you just asking him authentication  
12    questions now, but when he comes on the stand he's going to  
13    be testifying about a whole different range of subject  
14    matters that were not covered in your deposition. That's  
15    all I'm asking, and I don't mind asking you to say exactly  
16    how that's going to happen. I'm just saying, am I to  
17    understand that this witness is going to be put on the stand  
18    primarily for the purposes of authenticating records?

19            MR. KNOWLES-KELLETT: We believe that's the  
20    primary purpose because he has very limited personal  
21    knowledge beyond the authentication, but I think that Mr.  
22    Kay's counsel would agree that they do have a taste of what  
23    personal knowledge he has. He knows some of the people  
24    listed in the documents. He has had some dealings with Mr.  
25    Kay, you know, which Mr. Kay would know about, but primarily



1 it's to authenticate these documents and explain how they  
2 were derived.

3 JUDGE SIPPEL: All right. Okay. Now, I want to,  
4 again, focus on what Mr. Gehman's concerns are and,  
5 obviously, there's the concerns of Mr. Killian's and that is  
6 that this man is coming back now for his second day of  
7 deposition, and what he wants to see done and what I would  
8 like to see done is have some assurance leaving here today  
9 that he's going to be finished on the day he comes back to  
10 finish his deposition that he's going to be finished in one  
11 day, and that his deposition doesn't take on a scope that's  
12 not contemplated by our discussions here this morning.  
13 Which, again, that leads me into the scope of the deposition  
14 -- of the documents which have been -- to which I -- to  
15 which I signed a subpoena. I'm very concerned about -- so,  
16 I mean, that's all I'm trying to get resolved here this  
17 morning.

18 I'm not asking anybody to really tip their hand in  
19 terms of their case, but you've told me what I want to hear  
20 -- I mean, what I want to know you've told me. Now, having  
21 hear that, Mr. Fenske, what is it that you intend to do with  
22 this witness when he comes back on the stand? You've  
23 already had a considerable amount of time with him in cross-  
24 examination.

25 MR. FENSKE: Well, Your Honor, essentially I think

1 we attached the relevant deposition -- Killian Deposition  
2 Exhibits as Exhibit G to our most recent pleading that we  
3 filed yesterday.

4 JUDGE SIPPEL: I've looked at those.

5 MR. FENSKE: As you certainly can tell, there is a  
6 great deal of information on there. We are trying to figure  
7 out what he knows firsthand, and to gather that information,  
8 there is no other way that I can see necessary or other way  
9 we could do this, other than basically plowing through the  
10 whole thing. Because we need to know what he's going to  
11 testify about. Now, with that being said, nothing would  
12 make Mr. Kay happier and it would free up a day in  
13 California and probably make Mr. Gehman and Mr. Killian very  
14 happy if we didn't have to go through this exercise.

15 The Bureau has, and I appreciate their candor, has  
16 indicated that he does not have little if -- if I can  
17 paraphrase -- he has little or no personal knowledge of  
18 these issues. I'm not clear in my own mind what they can do  
19 with these documents because of the hearsay problems.

20 JUDGE SIPPEL: Well, that's their problem. If  
21 you're going -- if you're going to use your time and Mr.  
22 Kay's money to perfect their case, then I don't -- this is  
23 something that I really don't understand.

24 MR. FENSKE: No, it's not perfection, at all.  
25 It's trying to understand exactly what they intend to do

1 with Mr. Killian. I have read in the past in pleadings and  
2 orally and Mr. Gehman has done the same thing, said there's  
3 a problem with calling him as a witness. I think the Bureau  
4 recognizes that. We could, without any prejudice, of  
5 course, we could probably stipulate that Christopher Killian  
6 sent these letters into the Commission on such and such a  
7 date and such and such a time. That still doesn't get over  
8 the fundamental hearsay problem that is within these  
9 documents.

10 JUDGE SIPPEL: But the hearsay problem is not your  
11 problem.

12 MR. FENSKE: Well, if -- I'm trying to resolve the  
13 issue now so that the deposition can possibly be eliminated.  
14 I don't think that's beyond the realm of possibility. But,  
15 I think if the Bureau is going to, at this point in time,  
16 and that's their prerogative and I appreciate and understand  
17 that, insist that Mr. Killian has personal knowledge about  
18 some of the items in here, well, we're going to ask him  
19 about it and we just scratched the surface in our -- with  
20 Mr. Killian in our December deposition.

21 JUDGE SIPPEL: Well now, these exhibits -- okay,  
22 these are the exhibits that you have -- he's already  
23 testified to these items that are attached to your reply  
24 brief?

25 MR. FENSKE: He has said that he's --

1     paraphrasing, of course, --

2                 JUDGE SIPPEL:   Yes.

3                 MR. FENSKE:   And the Bureau can certainly correct  
4     me, but I think much of his testimony without -- I didn't  
5     reread this deposition transcript, is that I gathered this  
6     information and I put it on a piece of paper and I sent it  
7     to the Commission.  That's, in short, I think what he  
8     testified to.

9                 JUDGE SIPPEL:   And this is with respect to -- I'm  
10    looking at these exhibits A through G --

11                MR. FENSKE:   Your Honor, just Exhibit G.  Those  
12    are the exhibits to the Killian deposition.

13                JUDGE SIPPEL:   Exhibit G.  What about A, B, C --  
14    what about A through F?

15                MR. FENSKE:   Those are issues that were raised in  
16    Mr. Killian's pleading.  If you want me to talk about that,  
17    we certainly can.  I'm, at this point in time, focusing on  
18    Mr. Killian's testimony and the fundamental problem with --  
19    with putting him on the stand.

20                JUDGE SIPPEL:   With who putting him on the stand?  
21    Wait a minute.  That's a very broad -- the Bureau or you  
22    putting him on the stand?

23                MR. FENSKE:   No.  With the Bureau putting Mr.  
24    Killian on the stand.  I think -- like I said, I have raised  
25    the issue.  Mr. Gehman raised the issue and absent some sort

1 of -- absent his -- the Bureau's telling us that they're not  
2 going to use Mr. Killian, then we're going to have to go  
3 forward with, among other things, examining what's in --  
4 basically all that's in Exhibit G and there is a ton of  
5 information.

6 JUDGE SIPPEL: Well, there's a ton of information,  
7 but that can be handled in -- I mean, you're experienced  
8 lawyers, but you know, as well as I do, that that can be  
9 handled in a variety of ways. And, if all you're trying to  
10 do is determine whether or not this person is going to pass  
11 some standard of reliability to sponsor hearsay evidence, it  
12 would -- you wouldn't need to go into as much depth as you  
13 would if you were using him for some other purpose. Let's  
14 say, for example, as an expert witness. If he's going to  
15 give you his explanation in terms of how he or how he either  
16 collected or how he understands other people collected the  
17 information and what he did with it and what he knows about  
18 it when it was being submitted to the Commission, this line  
19 of questioning should not take too long.

20 MR. FENSKE: Well, considering --

21 MR. SCHAUBLE: Your Honor, that would also --

22 JUDGE SIPPEL: Let me --

23 MR. SCHAUBLE: I'm sorry.

24 JUDGE SIPPEL: Go ahead.

25 MR. SCHAUBLE: I'm sorry.

1 JUDGE SIPPEL: Yeah, go ahead. But you're going  
2 to answer this, Mr. --

3 MR. SCHAUBLE: Yeah, and I would also note that  
4 that was basically the subject -- the subject here that the  
5 Bureau went into in its questioning of Mr. Killian is how  
6 those -- you know, how he went about collecting this  
7 information and, you know, basically what he did with this  
8 information.

9 JUDGE SIPPEL: All right. So, well, again the  
10 Bureau is just reemphasizing what I'm saying. I'm asking.  
11 I'm asking. I'm not saying.

12 MR. FENSKE: And I understand that. I just am not  
13 even close to being comfortable with the fundamental hearsay  
14 problems involved in this.

15 JUDGE SIPPEL: I'm not expecting you to be  
16 comfortable with it. I'm saying it's not your problem,  
17 though. It's not your problem to straighten out the  
18 hearsay. If they can't -- if they can't meet the standards  
19 to admit the evidence or to have the evidence received and  
20 the evidence is being offered against your client, --

21 MR. FENSKE: Well, I do respectfully disagree on  
22 one small point. It is our problem because -- but if this  
23 issue was resolved, i.e. resolved the way Mr. Gehman --  
24 believe it or not, we're on the same side on many of these  
25 issues -- resolved in the manner that -- that we would like

1 it resolved, i.e. that Killian would be -- Mr. Killian would  
2 be dismissed as a Bureau witness, then we wouldn't be going  
3 through this exercise. That's my -- that's my fundamental  
4 point.

5 I don't think we need to be here going over this  
6 and, you know, time and time again, because at the end of  
7 the day, of course, it's my opinion that on January 21st at  
8 the end of the day, I don't think he's going to be a  
9 witness.

10 JUDGE SIPPEL: All right. Mr. --

11 MR. FENSKE: And, until I hear that from somebody  
12 with authority, i.e. with the Bureau, we have to cross-  
13 examine and question him in the way that we find it  
14 necessary without any harassment -- I'll get to that in a  
15 second. Until we hear otherwise, we have to be prepared for  
16 what he's going to talk about.

17 JUDGE SIPPEL: That I certainly appreciate. I  
18 acknowledge and I'm not trying to -- as I say, I'm not  
19 trying to tell you how to conduct your cross-examination.  
20 My only concern here is with respect to the witness. The  
21 witness is -- Mr. Gehman has made this very clear in his  
22 pleadings, this is a witness who provided information to the  
23 Bureau and he finds himself now deeper into a case, deeper  
24 into a matter than he ever, ever anticipated he was going to  
25 be. And, all I'm trying to do is get some -- the only way I

1 can do this is by asking the attorneys who are going out  
2 there to conduct the examination.

3 MR. FENSKE: Right.

4 JUDGE SIPPEL: What is the depth, the intensity  
5 that you intend to go into these matters, because -- and I  
6 know you're going to have to do it until you feel that  
7 you've got the job accomplished. But, can it be done in one  
8 day?

9 MR. FENSKE: My honest answer is I would hope so,  
10 but I can't make any promises or guarantees.

11 JUDGE SIPPEL: All right. Mr. Gehman?

12 MR. GEHMAN: First, I'd note on page 43 in the  
13 deposition transcript that they asked him regarding one of  
14 these end users, "Do you have any documents or records of  
15 notes that you made at the time that would reflect where you  
16 got that information?" That was the question. Killian's  
17 answer, "No, none." And I submit that a few simple  
18 questions like that asked in summary fashion should answer  
19 Mr. Kay's legitimate concerns.

20 Beyond that, you know, this kind of in-depth  
21 probing, line by line, item by item or wanting to see all  
22 kinds of records that tangentially might be related here or  
23 there, that's just beyond a legitimate scope of what Mr. Kay  
24 needs to defend against Mr. Killian's expected testimony.

25 JUDGE SIPPEL: Hmm. Mr. Fenske?



1           MR. FENSKE: I'll, of course, express disagreement  
2 with that. We are going to prepare for this case with this  
3 witness under the assumption that he is going to be called.  
4 Again, I don't want to beat a dead horse, but I am going to  
5 go back to that theme time and time again. Until he is  
6 eliminated, if he is, at some point in time down the road as  
7 a witness which, again, I think we would all like, we have  
8 to have the opportunity to question him about his  
9 anticipated testimony.

10           JUDGE SIPPEL: Well, --

11           MR. FENSKE: I can't make it any shorter than  
12 that. That is our right to conduct this discovery and  
13 obtain the information relevant to this proceeding and then  
14 to his ability to testify as a Commission witness. And, any  
15 sort of limitation on that right presents a serious problem  
16 for us.

17           JUDGE SIPPEL: Well, I, again, I -- I mean, I  
18 agree with you up to a point. I certainly agree that you're  
19 entitled to cross-examine a witness that the Bureau has put  
20 on the stand, and I think that I've been very fair and  
21 liberal with respect to the deposition discovery leading up  
22 to that. This person hasn't even taken the stand in the  
23 hearing yet, but I -- I am not going to sit back and let you  
24 just examine this prospective witness ad infinitum to the  
25 point where he caves by way of exhaustion or something. You

1 -- there's rules of reason in terms of how far you can go.  
2 I just out -- Mr. Gehman outlined a scenario to you. I  
3 outlined a scenario to you. If this witness only knows so  
4 much in terms of how these documents were prepared and how  
5 much he was connected in terms with -- with firsthand  
6 knowledge of the information and certainly what he did with  
7 respect to what -- you know, how it got to him and what he  
8 did with it.

9 But, once you get beyond that, if he is not -- if  
10 he is not the person who actually collected the data, but he  
11 was relying on somebody else, you certainly are permitted to  
12 pursue that for purposes of determining the reliability of  
13 the evidence or, again, whether it would be -- you can line  
14 up your objections in terms of admissibility. This is  
15 exactly what the purpose of this is. But what -- what I'm  
16 afraid that I'm hearing you say is that you -- you may  
17 actually be going down line by line, item by item, and  
18 getting the same answer to every single line, which -- in a  
19 manner which could be overbearing upon and exhaustive of the  
20 witness. That's what I'm concerned about.

21 MR. FENSKE: Well, I don't know. I wish there was  
22 -- I know what an easy answer is but, apparently, we're not  
23 at that level yet, unfortunately. And, until that time, I  
24 do not know exactly what -- exactly what questions I'm going  
25 to ask him. But, other than I can assure everybody here

1     that there is not going to be any sort of harassment or  
2     anything resembling that. In fact, I think I need to make  
3     that point on the record, that without breaching any  
4     confidence from the Bureau, it was incredibly smooth and  
5     both parties agreed to that. Virtually every single minute  
6     at every single deposition which lasted over a week in Los  
7     Angeles last time there were no problems.

8             Your Honor, you know we only had to call you once  
9     and that was for basically a clarification on the  
10    sequestration order. There were absolutely no problems.  
11    So, to think that we're going to change -- that I'm going to  
12    change, because I'm going to be doing the bulk of it, is --  
13    you haven't heard any of those allegations because nobody in  
14    good faith could make them. And, I would represent to  
15    everybody here that I'm not going to -- we're not going to  
16    suddenly change philosophy just to be some sort of brut.  
17    Because that's not professional and we're not going to play  
18    that way.

19            JUDGE SIPPEL: Well, --

20            MR. GEHMAN: If I could add something?

21            JUDGE SIPPEL: Yes, --

22            MR. GEHMAN: I have a question. I have the  
23    impression from reading the transcript that Mr. Seidel -- I  
24    don't know if that's the correct pronunciation --

25            JUDGE SIPPEL: That's correct.

1 MR. GEHMAN: -- did much of the cross-examination.

2 JUDGE SIPPEL: He did.

3 MR. GEHMAN: And, are these not going to be in his  
4 office, again?

5 MR. FENSKE: The first deposition of Mr. Killian  
6 was conducted in a Federal building in downtown L.A.,  
7 without counsel I might add. And, the subsequent  
8 deposition, next week or whenever he's scheduled, will be at  
9 Mr. Seidel's office.

10 MR. GEHMAN: Okay. All right.

11 JUDGE SIPPEL: All right. Well, anything more on  
12 that? Mr. Schauble?

13 MR. SCHAUBLE: Your Honor, I was evaluating it,  
14 given what we have so far, the Bureau does not see why more  
15 than one day of deposition would be necessary in order for  
16 Mr. Kay to accomplish what he would legitimately need to  
17 accomplish with Mr. Killian on -- I think we have an idea  
18 to, you know, an idea of what Mr. Kay is trying to  
19 accomplish and we could see, you know, see ways of doing  
20 that relatively briefly while fully protecting his rights,  
21 but I think under the circumstances I don't think the Bureau  
22 sees where -- doesn't see a circumstance under which more  
23 than one -- one day of deposition would be needed.

24 JUDGE SIPPEL: All right. I think I have heard --  
25 I mean, I have pushed Mr. Fenske as far as I can, and all

1 I'm trying to do, as I said, the same way with my -- the way  
2 I'm handling the Bureau on this issue, I'm simply trying to  
3 get a feel in advance in terms of how much this witness is  
4 going to be put through. But I, from what I'm hearing here,  
5 I mean, I certainly was encouraged by the report from the  
6 last deposition -- that last deposition session out there,  
7 and I'm hoping that the same standard is met in the one  
8 that's coming up.

9 Now, I don't see any reason why, even looking at -  
10 - having hear what I've hear this morning from the Bureau  
11 with respect to this witness and having read the papers and  
12 having seen peruse the documents with respect to this  
13 Exhibit G, I don't see any reason why this witness can't be  
14 concluded in one day out there.

15 You are going to start at 9:30 in the morning.  
16 Let me say 45 minutes for lunch so that you can get back on  
17 the record in an hour, everybody gets back from lunch in 45  
18 minutes. You get yourself set up, you're back on the  
19 record, so you've lost -- you've only taken one hour out for  
20 that. It seems to me that certainly by the end of the  
21 business day, which I would put in the nature of around 5:30  
22 at the latest, that this witness should be off the stand as  
23 far as his deposition goes.

24 And, I'm not -- I'm not asking you to say that  
25 you're going to guarantee that that's going to be the case,

1 but I would think that you would agree that that certainly  
2 seems to be a feasible estimate of the time that it would  
3 take at this juncture.

4 MR. FENSKE: I can't sit here and disagree with  
5 that by any --

6 JUDGE SIPPEL: That's all I'm trying to do. I  
7 can't do anything more. Now, with respect to documents, am  
8 I to understand it was back in March of '95 that Mr. Kay's  
9 counsel received documents from the Commission pertaining to  
10 Mr. Killian?

11 MR. SCHAUBLE: Correct.

12 JUDGE SIPPEL: Did that come from a FOIA request?  
13 Is that how we got that, or how did that --

14 MR. KNOWLES-KELLETT: They were attached to our  
15 Answers to Interrogatories.

16 JUDGE SIPPEL: I see.

17 MR. KNOWLES-KELLETT: Because they asked us to  
18 identify certain complaints and in lieu of name, address and  
19 summary, we attached the complaints.

20 JUDGE SIPPEL: All right. Then these -- either  
21 these document are your Exhibits A - F, for example, A  
22 through -- yes, A though F.

23 MR. FENSKE: Those documents, Your Honor, arose by  
24 virtue of some statements that were contained at Mr.  
25 Killian's opposition. Essentially, Mr. Killian in his

1 written statements submitted the latter part of last week,  
2 middle or latter part of last week indicated that he was not  
3 a competitor of Kay's and that if he -- if I can paraphrase,  
4 he doesn't have an ax to grind against Mr. Kay, that he was  
5 merely serving as some sort of foot soldier for the  
6 Government. To be perfectly frank, as you would expect,  
7 Your Honor, that came as a -- as a big surprise to us. And,  
8 in fact, I would go so far as to say that is inaccurate, and  
9 we pointed out in our paper filed yesterday, and supported  
10 by Exhibits A through F that, in fact, he is -- he was a  
11 competitor. I think he is, as I understand his business,  
12 he's either out or soon to be out of the business, but he  
13 certainly served as a competitor -- I don't know the exact  
14 years, but I would say late 80s and maybe the first handful  
15 of years into the 90s.

16 We have -- and that really came as a surprise to  
17 us because -- in fact, Your Honor, I was doing a little  
18 homework last night in my bed, and I was reading the last  
19 prehearing conference dated December 4, 1997. I was unable  
20 to attend. Mr. Friedman was here on behalf of Mr. Kay and  
21 you asked the question, "Are they in competition with each  
22 other?" They being Mr. Kay and Mr. Killian. And then,  
23 continuing on your line of questioning. "I mean, is he in  
24 the same line of business as Mr. Kay?" And Mr. Gehman's  
25 response to your question was, "He used to be."

1 JUDGE SIPPEL: Well, I think I even had him  
2 footnoted in one of my -- I think a trilogy of orders on  
3 these depositions as a competitor. I mean, I came away with  
4 the impression that he was, in the broad sense, a competitor  
5 --

6 MR. FENSKE: So if he --

7 JUDGE SIPPEL: Maybe he's getting out or he's not  
8 geographically in the same area. So, your point being is  
9 that that impacts on his bona fide --

10 MR. FENSKE: Well, not only that, Your Honor, but  
11 this -- in this day and age of fairly close watch on  
12 Commission licensees that came very close to if not  
13 certainly was a misrepresentation.

14 JUDGE SIPPEL: Well, I'm not going to  
15 characterize any of that. I'm simply saying, again, we're  
16 talking about the scope of permissible questioning and, I,  
17 again, would be -- you certainly are authorized to go into  
18 that area. You've got -- now, I did an earlier ruling on  
19 credibility. Credibility is not to be examined with --  
20 through the use of extrinsic evidence.

21 MR. FENSKE: Your Honor, may I comment on that?

22 JUDGE SIPPEL: Yes, you certainly may. But --

23 MR. FENSKE: Your prior order --

24 JUDGE SIPPEL: But --

25 MR. FENSKE: Your prior order, of course, was



1 directed in regard to the Bureau's deposition. I just want  
2 to make it clear for everybody that this is our deposition.  
3 A different set of procedural rules I think apply under that  
4 set of circumstances.

5 JUDGE SIPPEL: No. You're not going to vary from  
6 the ruling I've already made with respect to the -- the  
7 application and Federal Rules of Evidence in terms of, you  
8 know, in the narrow rulings that I have made thus far.

9 MR. FENSKE: So that your ruling, relying on the  
10 Federal Rules of Evidence, if I understood you correctly,  
11 you are applying that in the context of our deposition next  
12 week -- just to make sure I understood you correctly?

13 JUDGE SIPPEL: Under the scope of -- well, yes. I  
14 said what I said, and it has to do with -- the specific  
15 thing that I'm referring to is in 97 M 199 is the -- not the  
16 -- the non-use of extrinsic evidence on credibility issues.  
17 Now, you're going down that road. I'm not denying you the  
18 right to go down that road, as you've framed it here, and  
19 you have documents that you've obtained from the Bureau that  
20 you've tabbed as Exhibits A through F.

21 MR. FENSKE: Clarification on that. I think I'll  
22 beat John to the punch. Those documents were not obtained  
23 from the Bureau.

24 JUDGE SIPPEL: They were obtained -- A through F -  
25 -